Supreme Court, U. S.
FILED
APR 4 1980
MICHAEL RODAK, JR., CLE

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-1558

THOMAS H. THEODOSOPOULOS,
Petitioner

v.

STATE OF NEW HAMPSHIRE,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW HAMPSHIRE
APPENDICES

Eugene M. Van Loan, III, Esquire
95 Market Street
Manchester, New Hampshire 03101
(603) 669-4140
Counsel for the Petitioner

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APPENDIX A.

THE STATE OF NEW HAMPSHIRE
SUPREME COURT

[redacted]
CAROL A. BELNAIN
DEPUTY CLERK

1 9 8 0

January 7

FRANK ROWE KENISON
SUPREME COURT BUILDING
CONCORD, N. H. 03301
(603) 271-2646

Peter W. Heed, Esq.
Assistant Attorney General
State House Annex
Concord, NH 03301

Eugene M. Van Loan, III
Wadleigh, Starr, Peters, Dunn & Kohls
95 Market St.
Manchester, NH 03101

In re 78-248 State v. Thomas H. Theodosopoulos

Gentlemen:

On January 4, 1980, the supreme court denied the defendant's motion for rehearing and modified the opinion that had been issued on August 17, 1979 (distributed 9/14/79). I enclose a copy of the order.

The modifications appear on pages 7 and 13 of the enclosed copy of the manuscript.

Very truly yours,

Donna R. Craig
Office of the Clerk
Donna R. Craig

cc: Flynn, J.
Capistran, J.
Robert Murphy, Comm'r

Enclosures

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 78-248 State v. Thomas H. Theodosopoulos

the court upon .....January 4, 1980.....made the following order:

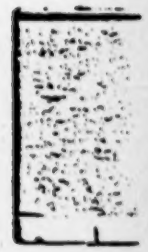
Motion for rehearing denied; opinion modified.

Concord,

.....1/7/80.....

George S. Pappagianis,
Clerk,

ter W. Heed, Esq.'
gene M. Van Loan, III, Esq.
bert Murphy, Comm'r
ynn, J.
pistran, J.



Hillsborough
No. 78-248

(137)

THE STATE OF NEW HAMPSHIRE

v.

THOMAS H. THEODOSOPOULOS

August 17, 1979

~~(distributed 9/)~~

Thomas D. Rath, attorney general, and (Peter W. Heed, assistant attorney general, orally), for the State.

Wadleigh, Starr, Peters, Dunn & Kohls, of Manchester (Eugene M. Van Loan, III orally), for the defendant.

BROCK, J. This case requires us to consider the constitutionality of a search conducted by the Manchester Police Department after a sniper shot was fired into the Manchester Police Station, seriously wounding two persons. The defendant was indicted on two counts of attempted manslaughter under RSA 630:2, 629:1. In this interlocutory appeal, the defendant excepts to the ruling of the Hillsborough County Superior Court (Flynn, J.) denying his motion to suppress physical evidence taken from his apartment and any statements he may have made at the time of the search.

Shortly after midnight on the morning of December 31, 1977, Mrs. Dorothy Perreault came to the Manchester Police Station to complain that her son had threatened her with a gun. At approximately 12:50 a.m., while she was standing at the desk in the lobby talking with police Captain Evangelos P. Xiggoros, a shot was fired. The bullet struck and seriously wounded both Mrs. Perreault and Captain Xiggoros.

State v. Theodosopoulos

The other police officers in the station reacted immediately by turning off all lighting in the building. They summoned several off-duty officers to the station, including a "Special Reaction Team" trained to respond to emergencies such as sniper fire. Because the shot was initially assumed to have been fired from within the station, the officers surrounded the station with patrol cars and uniformed officers, and thoroughly searched the interior of the station. They feared that the unknown assailant, whom they characterized as a sniper, remained positioned to fire additional shots. When Sergeant Louis Durette arrived, at 1:20 a.m., he observed policemen concealed behind cement walls and in doorways, and an officer called out to him, "Sarge, keep down. We don't know where the sniper is."

By approximately 1:45 a.m., the interior search was completed and the officers realized that the bullet had in fact come from outside the station. One group of officers then left the station environs to attempt to locate the Perreault boy as a possible suspect. A second group attempted to reconstruct the shooting to determine where the bullet had come from. A large bullet hole was discovered ten or eleven feet above the lobby floor in one of the large panes of glass that form the front wall of the police station facing Chestnut Street. With this new information, Sgt. Durette and the eighteen-man special reaction team first searched a large abandoned church building on the corner of Chestnut and Merrimack Streets, directly across Chestnut Street from the police station. When they found no evidence of the assailant, they returned to the station. Sgt. Durette and two other officers then lined up the

bullet hole in the window with the victims' locations when they had been hit. They concluded that the shot had probably been fired from a row of multi-storied apartment buildings extending westward down Manchester Street from the corner of Chestnut Street. The rear windows and fire escapes of these buildings faced a wide parking area and an alley that separated them from the abandoned church. There was a direct sight line from the front wall of the police station down the alley to the rear windows on the second and third stories of the apartment buildings. The special reaction team immediately began a methodical search of that row of buildings, both rooftops and interiors, beginning with a small store located on the corner closest to the police station. By that time it was about 2:05 a.m., one hour and fifteen minutes after the shot had been fired.

The search of the first few buildings yielded nothing. At about 2:15 a.m., eight officers entered a four-story apartment building at 83 Manchester Street. The ground floor and cellar were found to be clear, and an officer was posted to prevent anyone from leaving the building. The officers awakened the occupant of the second floor apartment, told her that there had been a shooting, and searched her apartment with her consent, without finding any sign of an assailant. She told them that she had not heard any shots or noise from upstairs.

Sgt. Durette and the special reaction team then moved upstairs and pounded on the third-floor apartment door. From under the doorway, they observed that a light was on in the apartment, but heard no noise or response. Sgt. Durette

then went down to the second-floor apartment to question its occupant further. According to Sgt. Durette, she told him that the third-floor resident "must be home" because his truck was parked outside. Sgt. Durette returned to the third floor and continued pounding on the door. He sent other members of his team to search the fourth floor and roof. He also communicated with officers at the police station by walkie-talkie and asked that they obtain keys to the third-floor apartment from the owner of the building. One of the special reaction team squads wanted to move on to the next building, but Sgt. Durette was determined to complete the search of that building before moving on.

When the keys arrived, none fit the doors to the third-floor apartment. Sgt. Durette felt that "the whole situation was very grave, . . . people's lives were in danger." He kicked open the weakest door and entered the apartment. It was then about 2:50 a.m., two hours after the shooting and about one-half hour after the search had focused on the third-floor apartment.

Once inside the apartment, the officers fanned out, looking for the person who had fired the shot and whom they thought might be preparing to fire additional shots. Sgt. Durette later testified that he went into the room that had lights on and saw marijuana plants growing in pots on the floor. He proceeded through the kitchen, which faced the alleyway, into a bedroom, also on the alleyway, where he found the defendant, apparently asleep. On a bureau, in plain view, were empty .350 caliber shell casings and a rifle scope. Other officers,

looking for a possible second person, entered the bathroom, adjacent to the kitchen and also facing the alleyway, and noticed a broken window from which there was a clear line of sight to the glass wall of the police station where the bullet had entered. The officers, with some difficulty, managed to arouse the defendant and took him to the police station where he was booked for the shooting.

A short while later, at about 6:00 a.m., relying primarily on facts discovered during the initial entry, the police obtained a search warrant from the Manchester District Court (Capistran, J.). While executing this warrant, the police thoroughly searched the defendant's truck and apartment, including a locked closet, and found and seized several items, including a pellet rifle, a 16-gauge shotgun, and a .350 caliber rifle. The defendant moved to suppress all physical evidence taken from his apartment and his truck, as well as any statements he might have made during and immediately after the initial search.

A warrantless search is per se unreasonable and invalid, unless it comes within one of a few recognized exceptions. Mincey v. Arizona, 437 U.S. 385, 390 (1978); State v. Thorp, 116 N.H. 303, 308, 358 A.2d 655, 660 (1976), citing Coolidge v. New Hampshire, 403 U.S. 443, 454-55 (1971); see U.S. CONST. amend. IV; N.H. CONST. pt. I, art. 19. We have held that the State has the burden of proving by a preponderance of the evidence that a warrantless search was constitutionally permissible. State v. Osborne, 119 N.H. , 402 A.2d 493 (1979); see Arkansas v. Sanders, 47 U.S.L.W. 4783, 4783 (June

20, 1979). The recognized exception that the State relies on in this case is that of probable cause to search plus exigent circumstances. See Warden v. Hayden, 387 U.S. 294 (1967); State v. Beede, 119 N.H. , A.2d (1979)(decided this day). The probable cause required for a warrantless search under the exigent circumstances exception is at least as great as that required to support a warrant. State v. Thorp, 116 N.H. at 306, 358 A.2d at 658, citing Wong Sun v. United States, 371 U.S. 471, 479 (1963); cf. United States v. Ferrara, 539 F.2d 799 (1st Cir. 1976) (warrantless search requires more probable cause).

In the present case, it is not our task to review the propriety of the entire sweep search conducted by members of the Manchester Police Department or of their search of stores and apartments other than the one occupied by the defendant. United States v. Scott, 520 F.2d 697 n.1 (9th Cir. 1975), cert. denied, 423 U.S. 1056 (1976). Rather, the issue before us is whether, at the moment the police officers entered the defendant's apartment, they had probable cause to search that particular apartment in connection with the shooting incident. United States v. Scott supra. The information gained as a result of the entry cannot, of course, be used to justify the entry itself. United States v. Di Re, 332 U.S. 581, 595 (1948).

The defendant correctly points out that, prior to the entry, the State did not have any information linking him personally to the crime that had been committed. This case is therefore different from traditional "hot pursuit" cases in which police officers have some clues to the identity of the person or persons they are chasing. See, e.g., Warden v.

Hayden, 387 U.S. 294 (1967); State v. Thorp, 116 N.H. 303, 358 A.2d 655 (1976). Compare Dorman v. United States, 435 F.2d 385 (D.C. Cir. 1970), with United States v. Lindsay, 506 F.2d 166 (D.C. Cir. 1974). In the present case, the determination whether probable cause for the search existed turns on whether, at the time of the entry, the officers reasonably believed that the "thing" sought, the sniper, was located in the place to be entered and searched. Zurcher v. The Stanford Daily, 436 U.S. 547, 556 (1978); State v. Doe, 115 N.H. 682, 685, 371 A.2d 167, 169 (1975); People v. Superior Court, 150 Cal. Rptr. 227, 232, 86 Cal. App. 3d 366, 373 (1978); People v. Mitchell 39 N.Y.2d 173, 347 N.E.2d 607, 383 N.Y.S.2d 246, cert. denied, 426 U.S. 953 (1976); Grimes, Probable Cause in the Zurcher Case, 17 Judges' Journal 25 (1978).

The record shows that the officers had calculated the bullet trajectory sufficiently to focus their search on a particular row of buildings along Manchester Street. By the time they reached the defendant's apartment, they had searched a significant ~~portion~~ number of ~~the~~ these buildings ~~that had windows facing the police station,~~ and had secured ~~the~~ those buildings, which were closer to the police station than the defendant's. Cf. People v. Bradford, 28 Cal. App. 3d 695, 104 Cal. Rptr. 852 (1972) (apartment house); People v. Mitchell, 39 N.Y.2d 173, 347 N.E.2d 607, 383 N.Y.S.2d 246, cert. denied, 426 U.S. 953 (1976) (hotel). The defendant's apartment was on the third floor, at a height compatible with the bullet path. Lights were on in the apartment and the defendant's truck was parked outside, leading the officers to believe that the apartment was occupied. When

no one responded to their persistent knocking, they had reason to conclude that the occupant wished to conceal his presence. United States v. Scott, 520 F.2d 697, 700 (9th Cir. 1975), cert. denied, 423 U.S. 1056 (1976). The evidence supports the trial court's finding that the State had sufficient probable cause to search the defendant's apartment.

Probable cause alone, however, is not sufficient to justify the search conducted in this case. See State v. Beede, 119 N.H. ___, ___ A.2d ___ (1979) (decided this day). Ordinarily, any search must be performed pursuant to a judicially issued search warrant. Arkansas v. Sanders, 47 U.S.L.W. 4783, 4785 (June 20, 1979). The warrant requirement is particularly stringent for a search of a private dwelling, in which the occupant has a strong expectation of privacy and protection from government intrusion. See United States v. Martinez-Fuerte, 428 U.S. 543, 561 (1976); State v. Beede, supra.

Nevertheless, exigent circumstances may justify a warrantless search where there is a compelling need for immediate official action and a risk that the delay inherent in obtaining a warrant will present a substantial threat of imminent danger to life or public safety. See Mincey v. Arizona, 437 U.S. 385, 392 (1978); Warden v. Hayden, 387 U.S. 294, 298-99 (1967); State v. Slade, 116 N.H. 426, 362 A.2d 194 (1976); Mascolo, The Emergency Doctrine Exception to the Warrant Requirement under the Fourth Amendment, 22 Buffalo L. Rev. 419, 426 (1973).

By statute and at common law, police officers have a duty to act as "conservators of the peace." RSA 105:3; Blais v.

—, —A.2d (1979)(decided this day);

Town of Goffstown, 119 N.H./[redacted] State v. Grant, 107 N.H. 1, 2, 216 A.2d 790, 791 (1966). As such, they have the right, and in some circumstances the obligation, to act expeditiously to protect the public from an armed person, known to be at large, who has just shot and wounded two other persons. See generally Mincey v. Arizona, 437 U.S. at 392; United States v. Barone, 330 F.2d 543, 545 (2d Cir.), cert. denied, 377 U.S. 1004 (1964); Mascolo, supra at 426; Note, 43 Fordham L. Rev. 571, 582 (1975). Whether a situation was sufficiently urgent to permit a warrantless search depends on the totality of the circumstances. United States v. Evans, 481 F.2d 990, 993 (9th Cir. 1973); State v. Mollberg, 310 Minn. 376, 246 N.W.2d 463 (1976). Even if it can be shown after the fact that no emergency existed, the warrantless entry may be sustained as long as the officers' perception of the emergency was reasonably grounded in the facts known to them at the time. Mascolo, supra at 427 n.33.

The record sustains the trial court's finding that a "highly volatile" emergency existed that justified the police entry into the defendant's apartment. A shot fired into the police station at midnight led the police to believe that there was a sniper at large in the immediate vicinity of the police station. Deputy Chief of Police Edmund LeBoeuf, who arrived at the station at 1:20 a.m., testified that the officers "knew a shot was fired and a couple people had been hit. They . . . expected almost anything . . . another shot." They knew that finding a magistrate and obtaining a warrant in the middle of the night could easily take an hour or two. See N.H. Attorney General, Law Enforcement Manual, ch. 7 § 8, at 52 (1972).

At some point, the passage of time during which a warrant could have been obtained destroys the State's claim of exigency. See, e.g., Michigan v. Tyler, 436 U.S. 499 (1978) (several days); G.M. Leasing Corp. v. United States, 429 U.S. 338, 358-92 (1977) (several days); State v. Beede, supra (two days). People v. Hampton, 587 P.2d 275 (Colo. 1978) (40 hours). "[T]he presence or absence of an ample opportunity for getting a search warrant" is a relevant factor in considering the reasonableness of any warrantless search. United States v. Rabinowitz, 339 U.S. 56, 84 (1950) (Frankfurter, J., dissenting); see McDonald v. United States, 335 U.S. 451, 455 (1948). On the other hand, police officers responding to an emergency are not required to initiate a search or arrest at the first moment that probable cause exists. United States v. Weinrich, 586 F.2d 481, 493 (5th Cir. 1978).

In the instant case, the defendant's apartment was searched approximately two hours after the shooting incident, and about one half-hour after the police had sufficient information to constitute probable cause. That delay did not, in and of itself, destroy the emergency and render the search "unreasonable" under the fourth amendment. See United States v. Simmons, 444 F. Supp. 500, 506 (E.D. Pa. 1978), aff'd, 591 F.2d 206 (3d Cir. 1979) (search sustainable even though considerable time had elapsed since onset of exigent circumstances). The police activity here was a methodical, continuous and vigorous attempt to apprehend an armed and dangerous person. See People v.Mitchell, 39 N.Y.2d 173, 383 N.Y.S.2d 246, 347 N.E.2d 246, 347 N.E.2d 607, cert. denied, 426

U.S. 953 (1976). There is no suggestion that the emergency was artificially created by the State's own action or inaction. See Williamson, The Supreme Court, Warrantless Searches, and Exigent Circumstances, 31 Okla. L. Rev. 110, 123 (1978). Nor are there facts tending to show that the State's failure to obtain a warrant reflected an absence of concern for protecting fourth amendment values. See McDonald v. United States, 335 U.S. 451, 455 (1948); United States v. Brightwell, 563 F.2d 569, 576 (3d Cir. 1977) (Lord, J. dissenting). The constitutionality of a given search does not turn on this court's after-the-fact evaluation of whether, as a tactical matter, the police could have deployed their forces differently in response to a confusing emergency situation. United States v. Weinrich, 586 F.2d at 494. We affirm the trial court's ruling that the warrantless entry into the defendant's apartment was both supported by probable cause and justified by a life-endangering emergency created by sniper fire.

The defendant further contends that even if the initial entry was justified, the subsequent search of his apartment exceeded its permissible scope. See United States v. Goldenstein, 456 F.2d 1006 (8th Cir. 1972), cert. denied 416 U.S. 943 (1974); State v. Slade, 116 N.H. 436, 362 A.2d 194 (1976). In particular, he challenges the admissibility of a spent shell found in the living room and the broken bathroom window.

The emergency doctrine cannot be used to justify a search primarily directed towards gathering evidence of past criminal activity, no matter how violent the crime. Mincey v. Arizona,

437 U.S. 385 (1978); Michigan v. Tyler, 436 U.S. 499 (1978); People v. Mitchell 39 N.Y.2d 173, 383 N.Y.S.2d 246, 347 N.E.2d 607, cert. denied, 426 U.S. 953 (1976). An emergency search is "strictly circumscribed by the exigencies which justify its initiation." Mincey v. Arizona, 437 U.S. at 393, quoting Terry v. Ohio, 392 U.S. 1, 25-26 (1968). Once inside the apartment, however, the officers were authorized to conduct a limited search confined to what was reasonably necessary for the purpose of the entry. State v. Slade, 116 N.H. at 438, 362 A.2d at 196. Because the officers did not know the identity or the number of persons involved in the shooting, it was reasonable for them to look for one or more persons, as well as for weapons, in all the rooms of the apartment, especially those with windows facing the alleyway and the police station. See People v. Olajos, 397 Mich. 629, 246 N.W.2d 828 (1976); State v. Max, 263 N.W.2d 685 (S.D. 1978). Once in these rooms, they were not required to close their eyes to items of apparent evidentiary value that confirmed the link between the defendant and the shooting. See Coolidge v. New Hampshire, 403 U.S. 443, 468 (1971); Warden v. Hayden, 387 U.S. 294, 300-01 (1967); State v. Hardin, 90 Nev. 10, 15, 518 P.2d 151, 154 (1974); Mascolo, supra at 426-27.

Pursuant to a warrant supported by an affidavit relying on information gained during the warrantless entry, the officers searched the defendant's truck and apartment, and seized weapons, live and expended ammunition, and marijuana. These items are admissible because the initial warrantless entry was not constitutionally invalid. State v. Osborne, 119 N.H. ,

402 A.2d 493, 496 (1979), citing Wong Sun v. United States, 371 U.S. 471 (1963). The trial court did not err in denying the defendant's motion to suppress this evidence.

The defendant also seeks to exclude "any and all statements . . . issued by the defendant contemporaneous or subsequent to the entry of his apartment," on the ground that these statements, as well as the physical evidence, were tainted by the illegal search.[1] See State v. Beaulieu, 119 N.H. , 402 A.2d 178 (1979). Furthermore, the record before us fails to indicate that the defendant ever made any statements "contemporaneous or subsequent to the entry of his apartment." Notwithstanding the provisions of Rule 98 (now Rule 99) of the Rules of the Superior Court, neither counsel was able to represent at oral argument that any such statements actually exist.

On this interlocutory appeal, we refuse to speculate either as to the existence of such statements or as to bases for their suppression other than the claim made here that the search was illegal.

Exceptions overruled; remanded.

All concurred.

[1] Since we uphold the constitutionality of the search, it provides no basis for suppressing such statemen

APPENDIX B

THE STATE OF NEW HAMPSHIRE

SUPERIOR COURT

HILLSBOROUGH COUNTY, APRIL TERM, 1978.

STATE

v. STATE #1054A and 1055A

THOMAS H. THEODOSOPOULOS, Defendant.

RULINGS AND FINDINGS
on
DEFENDANT'S MOTION TO SUPPRESS

The defendant, Thomas H. Theodosopoulos, has been indicted under two indictments for attempted manslaughter. Both indictments substantially allege that the defendant on December 31, 1977, "in the general area of 83 Manchester Street, Manchester, New Hampshire, did attempt to commit the crime of manslaughter in that he did commit the following acts, which under the circumstances as he believed them to be, constituted a substantial step toward the commission of said crime of manslaughter in that he did recklessly in the night time fire a loaded rifle . . . through a plate glass window into the illuminated lobby of the Manchester Police Station, situated at 351 Chestnut Street, Manchester, New Hampshire, thereby striking ..." police Captain Evangelos P. Xiggoros and Dorothy Perreault causing them bodily injury.

The defendant moves to suppress all physical evidence taken from him "in his apartment on the third floor at 83 Manchester Street, in Manchester and/or his motor vehicle, New Hampshire Registration EA-2666, and any and all statements, whether (sic) or oral, issued by the defendant contemporaneous or subsequent to the entry of his apartment at 83 Manchester Street, on December 31, 1977. ... ."

At approximately 12:50 a.m., on December 31, 1977, Captain Xiggoros and Mrs. Perreault were standing at the desk in the lobby of the Manchester Police Station when a shot was fired through a window striking both of them. Mrs. Perreault was in the station complaining that her son had made threats on her life.

Initially, the police thought that the shot had been fired by Mrs. Perreault's son, and that the individual responsible for firing the shot was within the station.

Captain Xiggoros and Mrs. Perreault were removed from the station and taken to a hospital. The lights in the station were immediately darkened so that, if any further shots were fired, personnel inside would be protected from further attack. Between 1:00 a.m. and 1:20 a.m., the area around the police station was cordoned off. Numerous police officers were also deployed around the station to prevent the escape of the assailant. After it was determined that the assailant was not in the station and the station was found to be secure, three Special Reaction Team forces, including the one lead by Sergeant Louis Durette, went into operation shortly after his arrival at 1:20 a.m.

Durette was the first to observe the bullet hole in the window which was about five to six inches in diameter and, due to the angle and height of entry, it was thought that the shot had been fired from one of the surrounding buildings. Sergeant Durette's team left the stationhouse and searched a church on the corner of Merrimack and Chestnut Streets. A search of this building and observation of the roof revealed nothing. The search next proceeded to a grinder or sub shop on the west side of Chestnut Street, facing the station. The police could not gain entry, but observation through the windows revealed nothing.

Regrouping back inside the station, the SRT team tried to determine the trajectory of the bullet by lining up the bullet hole in the window and the location where Captain Xiggoros and Mrs. Perreault had been standing. It was determined that the shot probably had been fired from the direction of the rear of apartment buildings facing Manchester Street. The search was then widened to include these neighborhood buildings and rooftops as the police were now looking for a sniper.

It was now about 2:00 a.m. or 2:15 a.m., when the SRT began its search and observations of these Manchester Street buildings. Coming to the building in question at 83 Manchester Street, a search was conducted of the ground floor and nothing was found. On the second floor, a tenant, Mrs. Irene Berlinguette, was aroused from her sleep who, upon questioning, told the police that the defendant lived upstairs but that she had neither seen nor heard anything. Her apartment was also searched with her consent. While the search of the building in question was proceeding, two other teams were also conducting a search of the alley and other buildings in the general vicinity.

The SRT team then went to the third floor where they knocked on the door of the defendant's apartment. Sergeant Durette knew that there was a light on in the apartment. Obtaining no response, the officers inquired of Mrs. Berlinguette whether anyone lived upstairs or was at home. She advised Sergeant Durette that the defendant occupied the apartment and that, if his truck was parked outside, the defendant must be at home. It was discovered that the truck was outside. The police then continued to knock on the door to the defendant's apartment with their nightsticks and knuckles, and still there was no response. Sergeant Durette was determined not to leave the building, because to leave the building without checking the apartment would have been contrary to standard operating procedure in a search of this type.

Arrangements were then made through Officer Murphy at the station to obtain the keys from the landlord. The keys turned out to be the wrong ones, as they failed to fit any of the doors to the defendant's apartment.

Having exhausted all efforts to gain entrance to the apartment and sensing a grave situation where the lives of the police and others could be in danger, Sergeant Durette, at about 3:00 a.m., as team captain, made a decision to enter the apartment without either a search warrant or an arrest warrant. One of the locked doors to the apartment was somewhat loose. Sergeant Durette kicked it open and made an entry.

When the police entered the apartment, they saw nobody in the living room. Having found nothing amiss in the living room, the police continued to investigate the remainder of the premises. In an adjacent room, they observed marijuana. Proceeding through a hallway, they went to the kitchen, which was at the rear facing an alley. The bedroom was to the right of the kitchen, and the bath was to the left. In the bedroom, empty shell casings were observed on a bureau as well as a telescopic sight for a rifle. They then saw the defendant in bed. They shook him and had difficulty in arousing him. The police did not know whether the defendant's drowsiness was due to sleepiness or intoxication or whether it was being feigned. Two men were left to guard him and further investigation of the apartment continued. The police then observed a broken bathroom window that faced the police station. Deputy Chief LeBoeuf was then summoned by Sergeant Durette from the police station across the street. The police also noticed a padlocked closet which they did not attempt to open.

The police managed to wake up the defendant and had him put on his clothes. Deputy LeBoeuf upon his arrival looked at the broken bathroom window and spent cartridges and then advised the defendant that he was to be detained

at the station concerning a shooting incident. Around 3:15 a.m., the defendant was brought to the station and booked.

Later in the morning, at about 6:00 a.m., a search warrant was obtained from Judge Capistran, of the Manchester District Court, on the basis of an affidavit by Lieutenant Crotty that included details from Sergeant Durette, observation of the shell casings, the broken bathroom window and the trajectory of the path from the window to the police station. Around 6:30 a.m., a search of the locked closet was conducted under the search warrant and additional items were removed.

The defendant claims that: (1) the police conducted an invalid search by entering his apartment without probable cause and without a search warrant; and (2) the issuance of a search warrant by Judge Capistran was a product of the prior illegal entry and was also invalid. The defendant therefore maintains that all items or evidence obtained by either search should be suppressed.

The United States Supreme Court has stated that the "core" of the Fourth Amendment is the individual's "privacy against arbitrary intrusion by the police." Wolf v. Colorado, 338 U.S. 25, 27 (1949). Implementing this principle, the Court has mandated that warrantless police invasions of personal privacy "are per se unreasonable under the Fourth Amendment - subject only to a few specifically established and well-delineated exceptions." Katz v. United States, 389 U.S. 347, 357 (1967); Vale v. Louisiana, 399 U.S. 30 (1970); Coolidge v. New Hampshire, 403 U.S. 443, 454, 455 (1971). The burden rests upon those seeking exemption from the general rule requiring a warrant to prove that the "exigencies of the situation made that course imperative." McDonald v. United States, 335 U.S. 451, 456 (1956). Subject to that burden, an "emergency doctrine" exception to the Fourth Amendment is recognized.

Warden v. Hayden, 387 U.S. 294, 289 (1967). In short, the Fourth Amendment does not outlaw all warrantless searches, but only those that are unreasonable. State v. Floyd, 116 N.H. 632, 634 (1976); South Dakota v. Opperman, 428 U.S. 364 (1976). The reasonableness of each case must be decided on its own facts and circumstances. Go-Bart Co. v. United States, 282 U.S. 344, 357 (1931); Harris v. United States, 331 U.S. 145 (1947).

New Hampshire applies these principles and follows the rule that the exigencies of a situation with probable cause may justify a warrantless search which might have been unreasonable if emergency circumstances had not existed. State v. Thorp, 116 N.H. 303, 308 (1976); State v. Slade, 116 N.H. 436, 437 (1976); see Coolidge v. New Hampshire, supra at 468.

A threshold issue is whether there was probable cause to make the initial entry. Evidence required to establish probable cause need not amount to what is required to convict. It is not necessary "to prove guilt beyond a reasonable doubt, to make out a prima facie case or even to establish that guilt is more probable than not." State v. Thorp, supra, at 307. The test simply is "whether a reasonable and prudent person in the position of the officer who conducts the search or makes the arrest and possessed of his knowledge would believe seizable items can be found or that an offense has been or is being committed." State v. Thorp, id.

A life-endangering crime had been committed by someone unknown, still at large. The angle and height of entry of the bullet limited the range of possible firing locations to the buildings on Manchester and Chestnut Streets, within view of the station. While the trajectory calculations were not made with a surveyor's precision, the approximation was enough to give the police sufficient information to form a reasonable belief that the shot had been fired from the area of 83 Manchester Street. At the time that the defendant's

apartment was entered, a significant portion of the suspected area had already been searched, so that the probability that the shot was fired from the remaining unsearched area increased.

As the search by Sergeant Durette's team focused on the defendant's apartment, their reason to believe that it might be connected with the attack intensified. A light was observed, which indicated to the officers that someone was present in the apartment. Their belief that someone was present in the apartment was strengthened by the presence of the defendant's truck which, as the police were informed, indicated that the defendant was at home. With a reasonable belief that someone was present in an apartment that was the reasonable object of suspicion, the police were met with no response to their persistent loud knocking. Under these circumstances, the entry was made with probable cause to believe that the apartment's search was necessary in connection with the investigation of the attack on the station.

Having found that probable cause existed for the initial search, the question next becomes whether there were exigent circumstances which justified this search without a warrant. In this case, the exigent circumstances are demonstrated by the facts preceding the search by the police.

The myriad of situations, which have been legally recognized as exigent circumstances, preclude the facile resolution by application of precise rules. Courts have generally tailored the definitions of "emergency" and "exigent circumstances" to the facts of each case. Here, the police were confronted with a totally unforeseeable shooting, perpetrated by an unknown sniper in the dead of night. The shot caused severe bodily injury to a police captain and a civilian standing in the lobby of the police station. Police reaction was swift, and the lights in the station were immediately darkened to obscure the vision of the assailant. The area around the station was cordoned off and

numerous police officers were deployed around the station to prevent the assailant's escape. Observations of the bullet's path soon led police to conclude that the shot had been fired from a building within view of the Chestnut Street entrance. This corroborated their assumption that the shot had been fired by a sniper. Reacting to this grave and uncertain situation, the SRT teams began to search the suspected buildings.

The nature of sniper fire is such that it cannot be known if and when it will be repeated. With the benefit of hindsight, it could be said that one shot was insufficient to create an emergency, but the severity of the crime, coupled with uncertainty about its recurrence, rightfully caused the police to be in constant fear for their own, as well as the general public's safety. This late night emergency did not give police sufficient time to execute an affidavit and present it to a judge to obtain a warrant.

It would have been unreasonable in such a pressing emergency period to require the police, as the defendant urges, to obtain a search warrant to pursue a possibly armed and dangerous assailant. The totality of the circumstances, along with every reasonable inference to be drawn therefrom, demonstrated an immediate need for the police to locate and disarm the suspect as quickly as possible, not only for their own safety but for the protection of the local citizenry as well. There was a need for a prompt response in an urgent situation fraught with imminent danger to thwart another attack. The police could not afford to lose valuable time during the critical phase of this criminal investigation. To take the time to seek a warrant would probably have frustrated the purpose behind the search, and the delay could make the subsequent search meaningless.

The defendant argues that the police had no specific information that linked his apartment to any offense or to any offender. The police according to the evidence searched the area on the first and second floors with

consent and found nothing and then proceeded to the third floor. The defendant argues that the systematic search of these units constituted a general search that could not be justified under the circumstances.

It should be pointed out once again, with respect to this argument, that a pressing emergency existed. Under the circumstances, where a sniper could probably be operating from an apartment building in direct line to the station, it was not unreasonable for the police in hot pursuit to have conducted a search of the apartment in the line of fire, for suspects and weapons. "The law recognizes that fresh pursuit of a fleeing suspect who has committed a grave offense and remains dangerous to life and limb may constitute 'exceptional circumstances' sufficient to justify a search without a warrant...." People v. Smith, 63 Cal.2d 779, 797, 48 Cal. Rptr. 382, 394, 409 P.2d 222, 234 (1966); see also Terry v. Ohio, 392 U.S. 1 (1968), where the court referred to hot pursuit as an instance of exigent circumstances.

In Dorman v. United States, 435 F.2d 385, 392-393 (1970), the Court listed a number of considerations that can be useful if a warrantless search is reasonable. These include: (1) the existence of a grave offense, particularly a crime of violence; (2) the reasonable belief that the suspect is armed; (3) a clear showing of probable cause to believe the suspect committed the crime; (4) strong reason to believe the suspect is in the premises being entered; (5) a likelihood that the suspect will escape if not swiftly apprehended; and (6) a peaceable entry. It should be noted that all these considerations were present in this case with the possible exception of the sixth.

In Warden v. Hayden, supra, at 298-299, the Court stated, "The Fourth Amendment does not require police officers to delay in the course of an investigation if to do so would gravely endanger their lives or the lives of others. Speed here was essential, and only through a thorough search of

the house for persons and weapons could have insured that Hayden was the only man present and that the police had control of all the weapons which could be used against them or to effect an escape." (Emphasis added).

There is no doubt that the systematic search in question was an invasion of privacy which ordinarily would be unreasonable and in violation of the Fourth Amendment in the absence of some exigent circumstances. However, as previously indicated, the need for fast and effective law enforcement was overwhelming under the circumstances of this case. It was imperative that the police conduct an immediate and thoroughly intensive search of the area surrounding the police station for persons and weapons involved in the highly volatile situation.

In testing the reasonableness of this search, we should inquire how the situation would have appeared if the sniper had shot and possibly killed other police officers or citizens while the police were taking the time to seek out, present and explain the matter to a magistrate in the early morning hours. It is very possible that somebody could have been wounded or killed if the police had acted with the calm deliberation associated with the judicial process. In this situation, the preservation of human life was paramount to one's privacy under the Fourth Amendment.

One author has summarized the emergency doctrine as follows:

> "Law enforcement officers may enter private premises without either an arrest or a search warrant to preserve life or property, to render first aid and assistance, or to conduct a general inquiry into an unsolved crime, provided they have reasonable grounds to believe that there is an urgent need for such assistance and protective action, or to promptly launch a criminal investigation involving a substantial threat of imminent danger to either life, health or property, and provided further, that they do not enter with an accompanying intent to either arrest or search. If, while on the premises, they inadvertently discover incriminating evidence in plain view, or as a result of some activity on their part that bears a material relevance to the initial purpose for their entry, they may lawfully seize it without a warrant." E. Mascolo, The Emergency Doctrine Exception to the Warrant

Requirement Under the Fourth Amendment, 22 Buff. L. Rev. 419, 426-427 (1973).

In summary, the police were confronted with a violent crime which reasonably justified fears that the unknown perpetrator or perpetrators, who appeared to be armed, posed a substantial threat of imminent danger to life and property and might strike repeatedly if not swiftly apprehended. The police also had reason to believe that there was an urgent need for their assistance so that they should launch and pursue a "fan out" or "protective search" (see 3 Search and Seizure Law Report #8, August, 1976). The investigation was begun, not as a quest for incriminating evidence, but rather to protect life and property by hopefully apprehending the sniper.

After the investigation was begun, there was also a reasonable basis, amounting to probable cause, as previously indicated, to believe that the dangerous criminal was in the apartment building and a further likelihood that he could escape if not apprehended at once. After all efforts of gaining the defendant's attention to enter the apartment without force proved unavailing, pushing in the door to the defendant's apartment at the time was reasonably directed toward an emergency purpose and was not exploratory. This was not a planned warrantless search, but rather it was one that was made in good faith in response to an emergency and not to circumvent the warrant requirement.

In the Court's view, the conduct of the police, under the emergency circumstances and considering the time of the night, was reasonable, and a warrant was not required to enter the defendant's apartment. Therefore, the items obtained in the defendant's apartment after this warrantless but lawful entry, which were inadvertently observed by the police in plain view from a justified position, will not be suppressed. Since the initial entry was

lawful, the subsequent search by a warrant was also lawful, and the items seized under the warrant will not be suppressed.

The defendant, in his motion, also requests that certain statements obtained by the police after the defendant's detention be suppressed. Although the State had the burden of proof under Rule 96 to establish that the statements were legally obtained, the burden of going forward was on the defendant as the movant. Then the burden of persuasion and proof with respect to the admissibility of the statements would shift to the State. The defendant offered no evidence suggesting that the statements were illegally obtained. Not having satisfied his burden of going forward by introducing some evidence, the defendant's motion to suppress the statements will be denied. If the basis for the suppression of the statements was that they were tainted as a result of illegal searches, then the motion is denied in that it has been ruled that both searches were legally conducted.

In view of the above findings and rulings, the defendant's motion to suppress is denied.

Dated: April 25, 1978.

Charles J. Flynn
Presiding Justice

APPENDIX C

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

1979 Term
September Session

HILLSBOROUGH, SS.

THE STATE OF NEW HAMPSHIRE

v.

THOMAS H. THEODOSOPOULOS

NO. 78-248

MOTION FOR REHEARING

NOW COMES the defendant and respectfully moves that the Court order a rehearing upon its decision of September 14, 1979, for the following reasons:

1. The Court has erroneously determined that objective probable cause, without a subjective belief by agents of the state that the thing sought was located in the place to be entered and searched, is sufficient to justify a warrantless entry and search.

As was detailed in the defendant's brief on appeal, there was absolutely no testimony whatsoever at the hearing on the defendant's motion to suppress to the effect that the police officers involved actually believed that the object of their sweep search, the "sniper", was located in the defendant's apartment at the time that they broke in. On the contrary, the evidence revealed that the officers waited outside the defendant's apartment for approximately one half (1/2) hour while awaiting the keys. When the keys which did arrive were determined not to fit, the police officers broke into the defendant's apartment.

Sargent Durette, the leader of the search team, testified quite clearly at the hearing as to why the defendant's apartment was entered and searched. He stated that he had made the decision at the very commencement of the sweep search that he would "move down Manchester Street and search everyone of these buildings". (Transcript, p. 32). Sargent Durette testified that it was "our policy and our SOP in building searches" that when a sweep search was conducted, "you didn't leave a building until we searched it thoroughly" (Transcript, p. 49).

This Court states in its opinion, "in the present case, it is not our task to review the propriety of the entire sweep search conducted by members of the Manchester Police Department". (Opinion, p.4). By so stating the issue, the Court erroneously ignores the precedent conduct and decisions of the police which predetermined their entry into the defendant's apartment. The decision by the Court to slice out and review only "the moment the police officers entered the defendant's apartment" (Opinion, p. 4) thereafter leads the Court to its erroneous decision on the question of probable cause.

The Court makes no finding that the police officers subjectively believed that the person for whom they were searching was in the defendant's apartment, nor would the record support such a finding. The Court's holding that the police officers "had reason" to believe that the apartment contained their target is, of course, challenged by the defendant. On the other hand, regardless of the propriety of that conclusion, it is respectfully suggested that a finding of objective probable cause is Constitutionally insufficient to sustain the validity of a warrantless entry and search.

If the purpose of the exclusionary rule is to discipline the police, the Court must be concerned with the intentions and motivations of the police. State v. Spero, 117 N.H. 199 (1977). On the very same day that the present case was decided, the Court issued an admonition in another search and seizure case as follows, "Police are strongly urged not to act without a warrant when they doubt they have a basis to obtain one". State v. Buelu, ___ N.H. ___ (Decided August 17, 1979, distributed September 14, 1979). If the Court expects law officers to heed that advice, its desire will not be accomplished by the ruling in the present case. So long as one may safely run the risk that the hindsight of a reviewing Court may determine that sufficient facts existed to "give reason" for the search, the police will have no real incentive to restrain themselves in cases of doubt.

2. The Court has erroneously justified its conclusion that probable cause existed upon a misstatement of the evidence that "by the time they reached the defendant's apartment, they had searched a significant portion of the buildings that had windows facing the police station".

At the hearing before the Superior Court, the prosecution offered no evidence whatsoever as to the number of buildings or number of apartments located along Manchester Street where the sweep search was conducted. The evidence indicated that the series of apartments in which the defendant's apartment was located was in only the third building searched by Sargent Durette and his team. (Transcript, p. 34 - 37). As was clear from the evidence indicating that certain members of the team wanted to continue down the row of buildings on Manchester Street, the police had not searched the remaining available sites on Manchester Street before they came to the defendant's apartment.

The Court relies in its opinion upon this mistaken conclusion for obvious reasons. Clearly, if the search had narrowed down to the defendant's apartment, those cases which hold that probable cause may be created by excluding alternative locations where the thing sought may be found would be applicable. E.G., United States v. Scott, 520 F. 2d. 697 (CA 9, 1975). On the other hand, where there has been no focusing in upon the particular location, as there was none in this case, such cases are not germane.

The fact of the matter is that there was no evidence that the police had singled out the defendant's apartment at the time that they broke in. Again, as Sargent Durette testified, the reason that the apartment was searched was because, "you didn't leave a building until we searched it thoroughly". (Transcript, p. 49).

3. The Court erroneously failed to rule that the probable cause required for a warrantless search is greater than that required to support a warrant and to apply such ruling to the facts of this case.

The Court in its opinion states that the probable cause required for a warrantless search is "at least as great as that required to support a warrant", but makes no determination as to whether or not it is greater. A number of courts have determined that a warrantless search must be supported by a greater degree of probable cause than a search which is preceded by the neutral and detached review of a magistrate. United States v. Ferrara, 539 F. 2d. 799 (CA 1, 1976); Dorman v. United States, 435 F. 2d 385 (US App. DC, 1970); United States v. Brightwell, 563 F. 2d. 569, 571 (1977) (Dissenting opinion).

It is respectfully suggested that these Courts are correct and that a greater degree of probable cause exists to justify a warrantless search. In light of the defendant's other arguments concerning probable cause, the defendant also obviously suggests that such higher standard was not met in this case.

4. The Court erroneously refused to suppress statements allegedly made by the defendant on the incorrect basis that "no other grounds for suppressing such statements [other than as a result of an illegal search] has been asserted".

The defendant need only point to argument F of its brief to support its contention that "other grounds" were asserted as a basis for suppressing statements allegedly made by the defendant. By both brief and oral argument before this Court, the defendant has repeatedly asserted that the failure of the prosecution to introduce any evidence of such statements constitutes a failure to satisfy its burden of going forward. Likewise, the defendant by both brief and oral argument contended that any such statements were inadmissible because of the testimony by Lieutenant Crotty that the defendant exercised his Constitutional right to silence. (Transcript, p. 86).

On its face, therefore, the statement by the Court that "no other ground for suppressing such statements has been asserted" is palpably untrue. If the Court is intending by its language to suggest that such additional grounds were not raised before the Trial Court, that is likewise untrue. The defendant did file, through counsel, a detailed memorandum with the Trial Court prior to its determination of the case which raised the very same objections asserted in the Supreme Court.

The State did not even respond in its brief on appeal to the defendant's objections to the admission of statements. Indeed, it is the recollection of counsel for the defendant that the State conceded this point to the defendant in oral argument. It therefore, comes as somewhat of a shock to have the Court dismiss the issue with a statement that it had never been raised.

5. The Court erroneously determined that sufficient exigent circumstances existed to authorize a warrantless search.

Again, the Court apparently has held that the test of exigency, as well as probable cause, is objective rather than subjective. This is illustrated by the Court's statement that, "[the police] knew that finding a magistrate and obtaining a warrant in the middle of the night could easily take an hour or two". Although that may well be something that a police officer might assume, there was absolutely no evidence whatsoever in the case at bar that any of the officers made such an assumption. Indeed, the only evidence on the issue at all indicated that a warrant could have been obtained from the magistrate who ultimately issued the post-entry warrant. (Transcript, p. 83, 89 & 90).

To the extent that the Court relies upon such an assumption as stated in its opinion, the Court again ignores the issue of whether or not the police officers subjectively believed an emergency to exist. As detailed in the defendant's brief, the actions of the officers in awaiting the keys to the defendant's apartment clearly established that they had concluded that "exigent circumstances" did not exist.

Respectfully submitted,

THOMAS N. THEODOSOPOULOS

By his attorneys,

WADLEIGH, STARR, PETERS, DUNN & KOHLS

BY: Eugene M. Van Loan

Date: September 24, 1979

I do hereby certify that on the 24th day of September, 1979, a copy of the foregoing Motion was forwarded to Peter W. Heed, Assistant Attorney General, and Peter McDonough, Assistant Hillsborough County Attorney.

Eugene M. Van Loan